Matthias Chang Wen Chieh v Joseph William Yee Eu & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S5-23-32 OF 1996
KAMALANATHAN RATNAM JC
9 AUGUST 1997

Civil Procedure *— Stay of proceedings — Failure to exhaust contractual remedies before applying to court — Whether court ought to intervene to regulate affairs or resolve disputes between members of an association or society who have agreed to be bound by their own charter or code of conduct — Whether stay of proceedings ought to be granted — Practice Direction (West Malaysia) No 5 of 1989*

The parties were members of the Fraternity commonly called the Freemasons. The parties were members of Private Lodges which fell under the jurisdiction of the District Grand Lodge of the Eastern Archipelago, which covered Malaysia and Singapore. The District Grand Lodges in turn were subsidiaries of the Grand Lodge in the UK, and thus all Freemasons around the world owed allegiance to the Grand Lodge and were governed by its rules and regulations found in the Book of Constitution, the Antient Charges and Obligations and the Book of Rituals ('the Rules'). All members paid subscriptions as prescribed under the relevant laws of the Freemasons, and all these provisions constituted the contractual provisions which bound the members inter se.

The plaintiff complained that the defendants were involved in a conspiracy to defame him and asked for damages and injunctive relief. The first defendant initially denied the allegation of conspiracy and defamation, then later when the plaintiff moved to strike out the defence, filed an amended defence that the plaintiff's application to the court should be stayed because the plaintiff had failed to exhaust his remedies as provided for under the Rules. The plaintiff submitted that the Rules specifically allowed him to bypass the usual remedies because in the current situation it was not practical to use those remedies.

Held, granting the stay of proceedings:

(1) The members of the Freemasons had contractually agreed that between themselves they would try to settle all disputes concerning their activities without resorting to the filing of legal proceedings in court unless it is absolutely necessary and is so apparent to the Lodge. The nature of the plaintiff's grievances and the particular facts of the case were such that the proper forum was the appropriate body set up pursuant to the rules (see p 733E–H).

(2) The court has inherent jurisdiction to grant an order staying proceedings, and this power could be inferred from the Practice Direction on Adjournment (Practice Direction No 5 of 1989) (see pp 733I and 734A–C).

(3) In cases where an application for stay is launched on the basis that there is an alternative or cheaper mode by which the same dispute can be dealt with, a court must consider such application favourably. The defendant bears the onus of satisfying the court that an alternative forum exists whose jurisdiction both parties have ready access, that justice could be done with little inconvenience and expense, and that the stay of the proceedings would not deprive the plaintiff of any jurisdiction advantage (see p 734D–E).

(4) The court ought to exercise reticence and caution before intervening to regulate the affairs or resolve disputes between members of an association or society who have agreed to be bound by their own charter or code of conduct between themselves (see p 734F); *R v Benchers of Lincoln's Inn* (1825) 4 B & C 855; *Periasamy s/o Karuppan & Ors v National Union of Plantation Workers & Ors* [1975] 2 MLJ 108 and *Tharmalingam v Sambanthan* [1961] MLJ 63 followed; *Leigh v National Union of Railwaymen and Railwaymen & Anor* [1969] 3 All ER 1249 and *Enderby Town Football Club Ltd v The Football Association Ltd & Anor* [1971] 1 All ER 215 distinguished.

[Bahasa Malaysia summary

Pihak-pihak merupakan ahli-ahli Persaudaraan yang digelar 'Freemasons'. Pihak-pihak adalah ahli-ahli Private Lodges yang dirangkumi oleh bidang kuasa Daerah Grand Lodge Kepulauan Timur, yang meliputi Malaysia dan Singapura. Grand Lodges Daerah pula merupakan subsidiari Grand Lodge di UK, dan maka semua Freemasons di sekeliling dunia mengaku taat setia kepada Grand Lodge dan dikuasai oleh rukun dan peraturan yang didapati dalam Buku Perlembagaan, 'Antient Charges and Obligations' dan Buku Upacara Amal ('Kaedah tersebut'). Semua ahli telah membayar yuran seperti yang ditetapkan di bawah undang-undang relevan Freemasons, dan semua peruntukan ini membentuk peruntukan kontraktual yang mengikat ahli-ahli secara inter se.

Plaintif mengadu bahawa defendan-defendan adalah terlibat dalam konspirasi untuk memfitnahnya dan meminta ganti rugi dan relief injunksi. Defendan pertama pada mulanya menafikan pengataan konspirasi dan fitnah, kemudiannya apabila plaintif memohon supaya pembelaan dibatalkan, memfailkan pembelaan yang dipinda bahawa permohonan plaintif kepada mahkamah harus digantung kerana plaintif telah gagal habis menggunakan remedi seperti yang diperuntukkan di bawah Kaedah tersebut. Plaintif menghujahkan bahawa Kaedah tersebut membenarkannya secara khas untuk merentangi remedi biasa kerana dalam keadaan ini ianya tidak praktikal untuk menggunakan remedi tersebut.

Diputuskan, membenarkan penggantungan prosiding:

(1) Ahli-ahli Freemasons telah bersetuju secara kontraktual bahawa mereka akan cuba menyelesaikan semua pertikaian berhubung dengan kegiatan mereka antara diri mereka sendiri tanpa keperluan untuk melibatkan pemfailan prosiding undang-undang di mahkamah melainkan adalah amat perlu dan adalah ketara kepada Lodge tersebut. Jenis aduan plaintif dan fakta khusus kes adalah begitu hinggakan forum yang wajar adalah badan yang ditubuhkan menurut Kaedah tersebut (lihat ms 733E–H).

(2) Mahkamah mempunyai bidang kuasa sedia ada untuk membenarkan perintah bagi menggantung prosiding, dan kuasa ini boleh disimpulkan daripada Arahan Amalan Penangguhan (Arahan Amalan No 5 tahun 1989) (lihat ms 733I dan 734A–C).

(3) Dalam kes-kes di mana suatu permohonan untuk penggantungan dilancarkan atas dasar bahawa terdapat suatu cara alternatif atau yang lebih murah yang boleh menyelesaikan pertikaian yang sama, sebuah mahkamah mestilah mempertimbangkan permohonan sedemikian dengan positifnya. Defendan mempunyai beban untuk memuaskan mahkamah bahawa suatu forum yang alternatif wujud yang mana kedua-dua pihak mempunyai akses kepada bidang kuasa, bahawa keadilan boleh tercapai tanpa kesulitan dan perbelanjaan yang banyak, dan bahawa penggantungan prosiding tidak akan merampas sebarang kemudahan bidang kuasa daripada plaintif (lihat ms 734D–E).

(4) Mahkamah sepatutnya bersikap berat mulut dan berwaspada sebelum masuk campur untuk mengawal urusan atau menyelesaikan pertikaian antara ahli-ahli sebuah kesatuan atau masyarakat yang telah bersetuju untuk diikat oleh piagam atau kanun kelakuan di antara mereka (lihat ms 734F); *R v Benchers of Lincoln's Inn* (1825) 4 B & C 855; *Periasamy s/o Karuppan & Ors v National Union of Plantation Workers & Ors* [1975] 2 MLJ 108 dan *Tharmalingam v Sambanthan* [1961] MLJ 63 diikut; *Leigh v National Union of Railwaymen and Railwaymen & Anor* [1969] 3 All ER 1249 dan *Enderby Town Football Club Ltd v The Football Association Ltd & Anor* [1971] 1 All ER 215 dibeza.]

Notes

For cases on stay of proceedings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3126–3169.

Cases referred to

Enderby Town Football Club Ltd v The Football Association Ltd & Anor [1971] 1 All ER 215 (distd)

Hinckley and South Leicestershire Permanent Benefit Building Society v Freeman [1941] Ch 32 (refd)

Lawlor & Ors v Union of Post Office Workers [1965] 1 All ER 353 (refd)

Leigh v National Union of Railwaymen & Anor [1969] 3 All ER 1249 (distd)

Periasamy s/o Karuppan & Ors v National Union of Plantation Workers & Ors [1975] 2 MLJ 108 (folld)
R v Benchers of Lincoln's Inn (1825) 4 B & C 855 (folld)
Robertson v Cilia [1956] 1 WLR 1502 (refd)
Sykt Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang [1996] 2 MLJ 697 (refd)
Tharmalingam v Sambanthan [1961] 1 MLJ 63 (folld)

Legislation referred to

Rules of the High Court 1980 O 20 r 3

Harcharan Singh (*Harcharan Singh & Co*) for the plaintiff.
Cecil Abraham (*L Cheah* with him) (*Shearn Delamore & Co*) for the first defendant/applicant.

Cur Adv Vult

Kamalanathan Ratnam JC: This was an application by the first defendant (encl 18) to stay all proceedings until both the plaintiff and the first defendant exhaust all remedies available to them pursuant to the by-laws of the 'District Grand Lodge of the Eastern Archipelago' and the 'Constitution of the United Lodge of England' in relation to the issues raised by the plaintiff in the statement of claim and for costs in the cause.

Background facts

The plaintiff, an advocate and solicitor, and the defendants, are members of the Fraternity more commonly known as 'Freemasons' under the jurisdiction of the organization known as 'the United Grand Lodge of England' ('the Grand Lodge'). The membership in areas outside the United Kingdom is governed by its subsidiary organizations more commonly known as 'District Grand Lodges' which then are duly registered societies under the laws of the countries in which their members reside.

In Malaysia and Singapore, the Freemasons come under the jurisdiction of the 'District Grand Lodge of the Eastern Archipelago' of which the first defendant, a Singaporean with permanent resident status, is the head, and bears the title 'District Grand Master'. The second defendant, a resident of Hong Kong, like the first defendant, is the District Grand Master of the District Grand Lodge of Hong Kong and the Far East. Within the District Grand Lodge, there are several Private Lodges which come under its jurisdiction. The plaintiff and the first defendant are members of these Private Lodges.

All Freemasons who are members of the respective District Grand Lodges owe allegiance to the Grand Lodge and are governed by rules and regulations more particularly contained in the 'Book of Constitution' of the said Grand Lodge. Additionally, they are also governed by 'Antient Charges' which are analogous to customs and conventions, of the Fraternity as well as the several obligations which they are obliged to take, without

A which they cannot be admitted as members. The Antient Charges are contained in the Book of Constitutions as well as in the 'Book of Rituals'. All members pay subscriptions as prescribed for under the relevant by-laws of the Fraternity. All these provisions constitute the contractual provisions which bind the members inter se.

B Like any other society, the infraction of any provisions entitles the members to impose disciplinary measures on the defaulting members, such as to censure, to suspend and to expel.

The plaintiff's case against the defendants

C It is the plaintiff's case against the defendants that they conspired to injure and did in fact implement their conspiracy to injure the plaintiff in his integrity and profession or occupation by a systematic campaign of falsehood, misrepresentation, lies and abuse of the authority of their respective offices as District Grand Master of the respective Masonic
D Districts of the Eastern Archipelago and the District of Hong Kong and the Far East. The plaintiff further contends that the defendants exploited the trust which the members reposed in them to their advantage, so that when the members were confronted with a series of misleading statements, the benefit of doubt would somehow be in the defendants' favour.

E The plaintiff therefore claimed damages and further aggravated or exemplary damages, an injunction to restrain the defendants and each of them by themselves or by their servants or agents from publishing defamatory words and from continuing the campaign of falsehood and costs.

The plaintiff's reliance on the Antient Charges and Obligations

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In his statement of claim, the plaintiff pleaded that of particular importance and relevance to his case are the following extracts of Antient Charges and Obligations which all members are bound to uphold:

Antient Charges

G (a) A Freemason's tongue should always be ready to be used in a brother's defence or for his advantage; never to his prejudice, or in defamation or slander, for the tongue of slander inflicts a deeper wound than does the keenest sword. Therefore we should always speak of a brother in his absence as we would if he were present; but when unfortunately good cannot with truth be spoken of him, we should adopt the excellent
H motto of the Craft — silence.

(b) The pen is an emblem of silent communication. It should never be used but in just and righteous cause; nor on the other hand should it be backward in aiding and defending the helpless and the oppressed, but should always be ready to be used in the fearless championship of
I Innocence, Truth and Virtue.

(c) Your obedience must be proved by a strict observance of our laws and regulations.

Obligations

(a) That I will maintain a Freemason's honour and will carefully preserve it as my own; that I will not injure or malign him myself; nor knowingly suffer others to do so, if in my power to prevent it, but on the contrary will boldly repel the slanderer of his good name.

(b) That I will myself observe, and as far as lies in my power will strictly enforce, those Antient Charges and Regulations to which I have already given my assent; and that I will in all things, so far as in me lies, faithfully, zealously and conscientiously perform my duty ... .

The first defendant's case

His was a mere denial of the allegation of conspiracy and defamation.

The plaintiff, upon receipt of the defence, promptly filed an application, encl 9, to strike out the defence as showing no defence. The first defendant then filed an amended defence pursuant to O 20 r 3 of the Rules of the High Court 1980 and stated that the current constitution governing the members of the Grand Lodge is the 1989 Book of Constitutions and that the Ancient Charges of the Fraternity as contained in the 1989 Book of Constitutions include the following charges:

(a) ... If any complaint is brought, the brother found guilty shall stand to the award and determination of the lodge, who are the proper and competent judges of all such controversies (unless you carry them by appeal to the grand lodge), and to whom they ought to be referred, unless a lord's work be hindered the meanwhile, in which case a particular reference may be made, but you must never go to law about what concerneth masonry, without an absolute necessity apparent to the lodge.

(b) ... And if any of them do you injury, you must apply to your own lodge or his lodge, and from thence you may appeal to the grand lodge at the quarterly communication, as has been the antient laudable conduct of our forefathers in every nation, never taking a legal course but when the case cannot be otherwise decided ... .

It was the first defendant's case that the Antient Charges and Obligations set out therein have now been superseded by the provisions contained in the 1989 Constitution. The first defendant contended that the by-laws provide that all complaints and appeals shall be forwarded through the Master of a Private Lodge ('the Lodge') who is required to acknowledge receipt of the complaint or appeal and to submit the same to the District Grand Secretary and should the Master fail or refuse to do so, the complainant or appellant may submit the complaint or appeal directly to the District Grand Secretary. It was further contended that the plaintiff had not to date submitted a complaint pursuant to the by-laws and the District Grand Secretary had not received a complaint from the plaintiff on the matter set out in his claim to this court.

In reply, the plaintiff averred in his affidavit (encl 13) that the amended defence which included charge (b) was incomplete and that it ought to continue to include:

> ... and patiently listen to the *honest* and *friendly advice* of *Master* and fellows, when they would prevent your going to law with strangers, or would excite you to put a speedy period to all law suits, that so you may find the affair of masonry with the more alacrity and success; but with respect to brothers or fellows at law, the Master and brethren should kindly offer their mediation which ought to be thankfully SUBMITTED TO BY THE CONTENDING BRETHREN; and if that submission is impracticable, they must, however CARRY ON THEIR PROCESS, OR LAW SUIT WITHOUT WRATH AND RANCOUR (not in the common way), saying or doing nothing which may hinder brotherly love and good offices to be renewed and continued, that all may see the benign influence of masonry, as all true masons have done from the beginning of the world, and will do to the end of time.

Subsequently in his reply, the plaintiff included that which he had averred in encl 13.

The plaintiff argued that neither the Lodge nor the Fraternity could grant damages nor an injunction and that therefore he ought to be permitted to proceed to trial.

The court's findings

It is clear from the contents of the by-laws that the members of the District Grand Lodge have agreed between themselves that as far as is possible, they will settle all disputes concerning their activities without resorting to the filing of legal proceedings in court unless it is absolutely necessary and is so apparent to the Lodge. The Constitution of the Grand Lodge provides a full and detailed procedure to enable its members to seek redress for any perceived wrongs they have suffered, including the formation of a Committee of Enquiry and the opportunity for a subsequent appeal.

I find from the facts of the case that the plaintiff's cause of action against the first defendant is predicated on the acts committed by the first defendant in his capacity as the District Grand Master. From the pleadings, it is apparent that the events and facts concern the activities of the District Grand Lodge and the alleged failure of the District Grand Master to take steps to 'protect' or defend the plaintiff from perceived attacks made by members of the District Grand Lodge against him. I find that because of the nature of the plaintiff's allegations and the facts of this particular case, the proper forum for the plaintiff to air his grievances would be before the appropriate body set up pursuant to the by-laws of the District Grand Lodge and the Constitution of the Grand Lodge.

Practice Direction (West Malaysia) No 5 of 1989

This Direction which came into force on 1 January 1996 dealt specifically with matters concerning adjournments. Practice Direction 4(a)(i) which deals with civil trials reads as follows:

> 4 *Civil Trials*
>
> (a)(i) Apart from O 35 r 3 of the Rules of the High Court 1980, the High Court has inherent power to postpone or to adjourn the hearing of any matter in order to do justice between the parties

(see *Hinckley and South Leicestershire Permanent Benefit Building Society v Freeman* [1941] Ch 32). A

Whilst Practice Directions do not have the force that the Rules have, they cannot be treated as mere superfluous appendage to dot the law journals. Practice Directions are given to achieve a purpose. In this case, I am firmly of the view that whilst the said Practice Direction deals with the inherent B power to postpone or to adjourn the hearing to do justice between the parties, an order granting a stay would equally fall within the ambit of this Practice Direction. In fact, in *Hinckley and South Leicestershire Permanent Benefit Building Society v Freeman* [1941] Ch 32, the court held that it had the inherent jurisdiction to adjourn proceedings for a stated time but not generally or for an unreasonably long time (see *Robertson v Cilia* [1956] C 1 WLR 1502).

When ought a stay be granted

When an application for stay is launched on the basis that there is an alternative or cheaper mode by which the same dispute can be dealt with, D a court must consider such application favourably. The onus is on the applicant defendant to satisfy the court that there is an alternative forum to whose jurisdiction both he and the plaintiff have ready access and that justice could be done with very little inconvenience and expense to both parties. The defendant must also satisfy the court that a grant of a stay on E such a ground would not deprive the plaintiff of any juridical advantage.

Non-profit association or societies

An association or society is a gathering of a number of persons who agree to be bound by their own charter or code of conduct between themselves. F The court, whilst it has the power to intervene in disputes brought before it, ought to exercise reticence and caution before intervening to regulate the affairs or resolve disputes between its members. In fact, in *R v Benchers of Lincoln's Inn* (1825) 4 B & C 855; 107 ER 1277 the judges, who were also Visitors of the Inn, refused to issue a mandamus directing the Inn to admit an apparently qualified person as a student at law, and said that they did so G because 'they make their own rules as to the admission of members; even if they act capriciously upon the subject, this court can give no remedy in such a case; because in fact there has been no violation of a right'.

In fact, the very existence of an association or society is the will of its members to be bound by its code of conduct and the existence of a shared H common understanding between the members. It is my finding that members by joining an association or society and agreeing to subscribe to its charter have consented to selecting their own tribunal, and that the function of the court is to see that that tribunal applies the accepted rules and guidelines in its determination. It is my judgment that by agreeing to I accept its own tribunal, a member, and in this case the plaintiff, ought to allow for its own tribunal to proceed to hear his grievances and that if the said tribunal in any manner whatsoever disregards or over-steps its code of conduct or departs from the constitutional provisions, then he is free to

challenge that decision in this court. The members had chosen to associate themselves together and thus should use the forum provided by the said association to discuss matters of concern, and hear disputes. There is clear provision in the Antient Charges and Obligations for recourse to a court, if issues cannot be resolved within the Freemasonary.

Within our shores is the case of *Periasamy s/o Karuppan & Ors v National Union of Plantation Workers & Ors* [1975] 2 MLJ 108. In that case, the applicants were members of a trade union. The applicants sued for an injunction to restrain the respondents from taking or holding or remaining in office as executive members of the union, on the ground that their election was illegal. The matter was not referred to the Registrar of Trade Unions for a decision as required by the Constitution of the Union. The respondents raised as a preliminary objection the applicants' entitlement to sue. The court held that the applicants ought to have exhausted all domestic remedies before coming to court. In *Tharmalingam v Sambanthan* [1961] MLJ 63 (CA) in a dispute concerning the Malaysian Indian Congress, the then Court of Appeal held that it was a condition precedent that the appellant should resort to the domestic remedies provided before resorting to the courts.

The plaintiff relied on *Leigh v National Union of Railwaymen & Anor* [1969] 3 All ER 1249 to submit that relief would be granted even though the plaintiff had not exhausted or embarked on the domestic remedies afforded by the rules since these were not binding on the court so as to oust its jurisdiction to grant such relief as it saw fit.

On a detailed study of the said case, I note that Goff J said at p 1252:

> ... even where there is an express provision in the rules that the plaintiff must first exhaust his domestic remedies, the court is not absolutely bound by that because its jurisdiction cannot be ousted, *but the plaintiff will have to show cause why it should interfere with the contractual position.* (Emphasis added.)

In any event, *Leigh*'s case was a trade union dispute and in *Lawlor & Ors v Union Of Post Office Workers* [1965] 1 All ER 353 at p 363, Thomas J said:

> Trade union rules clearly cannot oust the jurisdiction of the courts.

In *Enderby Town Football Club Ltd v The Football Association Ltd & Anor* [1971] 1 All ER 215 at p 219, Lord Denning said:

> The rules of a body like this are often said to be a contract. So they are in legal theory. But it is a fiction — a fiction created by the lawyers so as to give the courts jurisdiction. This is no new thing. There are many precedents for it, from the time of John Doe onwards. Putting the fiction aside, the truth is that the rules are nothing more nor less than a legislative code — a set of regulations laid down by the governing body to be observed by all who are, or become, members of the association. Such regulations, although said to be a contract, are subject to the control of the courts. If they are in unreasonable restraint of trade, they are invalid: see *Dickson v Pharmaceutical Society of Great Britain* [1967] 2 All ER 558. If they seek to oust the

jurisdiction of the court, they are invalid: see *Scott v Avery* [1843–60] All ER Rep 1.

But in the instant case before me, the Antient Charges and Obligations specifically provide for the right of the plaintiff to resort to the court if all else fails. There is therefore no question of an ouster of the ordinary jurisdiction of the court.

Very recently, Mahadev Shankar JCA said in *Sykt Bekerjasama–Sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang* [1996] 2 MLJ 697 that the availability of an alternative domestic remedy will not shut out an application for judicial review where the complaint made to the court is one of 'error of law' or 'abuse of power' going to the legality of the conduct of the inferior tribunal or other decision-making authority, unless the alternative domestic remedy was intended for and in fact constitutes a wholly adequate machinery for the just disposal of the complaint in question.

I therefore granted an order in terms of encl 18 with costs.

Order accordingly.

Reported by K Tang-Wai